

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EDWARD GIBSON II,

Defendant-Appellant.

UNPUBLISHED

January 4, 2005

No. 249428

Oakland Circuit Court

LC No. 02-187082-FC

Before: Neff, P.J., and Cooper and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant Robert Edward Gibson II appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC)¹ and first-degree child abuse.² Defendant was sentenced to eighty-five months to twenty-five years' imprisonment for his CSC conviction and five to fifteen years' imprisonment for his child abuse conviction. We affirm.

Defendant's convictions arose from an incident of physical and sexual abuse involving the sixteen-month-old daughter of his live-in girlfriend on October 22, 2002. Defendant was the only one home with the baby when he claimed that she fell out of her crib. The baby was taken to the hospital unconscious. Her examination revealed head injuries that could not have been caused by a short fall. The doctor also discovered injuries to the baby's vagina consistent with penetration.³

I. Prosecutorial Misconduct

Defendant challenges many instances of alleged prosecutorial misconduct. Prosecutorial misconduct claims are reviewed on a case by case basis, examining any remarks in context, to

¹ MCL 750.520b(1)(a) (person under thirteen years of age).

² MCL 750.136b(2).

³ The baby's vaginal opening was enlarged, torn and red, she had no hymen, there was blood in her diaper, and she had a scratch on her buttocks.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

determine if the defendant received a fair and impartial trial.⁴ As defendant failed to object to any of the challenged remarks, our review is limited to plain error affecting defendant's substantial rights.⁵ Any potential error may be cured by a trial court's instruction to the jury that the attorneys' arguments and statements are not evidence.⁶

A. Veracity of Witnesses and Defense Counsel

Defendant first contends that the prosecutor improperly vouched for the truthfulness of the prosecutor's evidence and misled jurors by attacking defense counsel's veracity. A prosecutor is not permitted to make personal assurances of a witness's veracity or claim to have personal information of which the jury is unaware that lends to the credibility of a witness.⁷ A prosecutor must also refrain from using his or her special knowledge or the prestige of his or her office to urge the jury to find the defendant guilty.⁸ However, a prosecutor is permitted to argue the evidence and any reasonable inferences from the evidence as it relates to his or her theory of the case.⁹

Defendant challenges three of the prosecutor's comments during rebuttal argument. Defendant first challenges the prosecution's assertion that the defense argument was not supported by the evidence. Defense counsel commented in closing argument that the doctor who signed the examination form was merely an attending physician. The prosecutor responded by reminding the jury of evidence that the supervising physician was present during the entire examination and supervised the attending physician throughout the procedure. As the comment was based on the evidence and directly responded to a defense argument,¹⁰ the prosecutor did not improperly vouch for the veracity of a prosecution witness.

Defendant next challenges the prosecutor's comment that the defense was trying to change the evidence.¹¹ Defense counsel argued that the supervising physician testified that the baby's injuries occurred within twenty-four hours of the examination, but later asserted that the injuries occurred within one or two hours of the examination. However, the supervising physician actually testified that the bruising to the baby's head and face and her vaginal injuries occurred very recently, but that the baby had some older bruises as well. Furthermore, when read in context, the prosecutor's use of the phrase "I honestly think" was not an attempt to assert

⁴ *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

⁵ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁶ *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003).

⁷ *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995).

⁸ *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

⁹ *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003).

¹⁰ *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003).

¹¹ Defendant specifically challenges the following statement: "And you know Ladies and Gentlemen, I honestly think that there are attempts to change what the evidence was. I mean, that's not what Dr. Armin testified to about those bruises, that's not what I remember anyway."

the credibility of her office or imply that she had extra-judicial information lending to defendant's guilt. Rather, the prosecutor asserted that defense counsel mischaracterized the evidence. After this isolated remark, the prosecutor reminded the jury of other evidence corroborating the doctor's testimony that the injuries were fresh. Accordingly, we find that this comment also amounted to proper argument.

Defendant finally challenges the prosecutor's statement referring to "smoking mirrors." Defense counsel argued that the baby's father may have caused her older injuries and that someone other than defendant could have caused the current injuries. However, defense counsel based this argument completely on a note in an unrelated medical record.¹² Defense counsel argued that the note indicated that the baby was doing well because her father was in jail. The prosecutor's comment about "smoking mirrors" specifically attacked the defense's interpretation of this note as the baby's mother testified that "doing well" meant that the baby had tested negative for TB. The comment also attacked the relevance of this evidence, as the baby's father was absent on October 22, 2002, and, therefore, could not have caused the baby's injuries. The prosecutor's comment was not a personal attack on defense counsel or his entire defense. The comment was proper rebuttal of a defense theory.

B. Defendant's Failure to Testify

Defendant also argues that the prosecutor committed reversible error when she commented on defendant's failure to testify in closing argument. A criminal defendant is presumed innocent and has the constitutional right not to incriminate himself.¹³ To ensure this right, a prosecutor may not reference or comment on a defendant's failure to testify or to present evidence.¹⁴ A prosecutor may take notice that evidence against the defendant is "uncontroverted" or "undisputed," even if the defendant is the only person who could have disputed the evidence.¹⁵

However, the prosecutor *never* referenced defendant's failure to testify. In the lengthy portion of closing argument cited by defendant, the prosecutor does not even assert that defendant had a duty to explain the evidence against him or prove his innocence. In fact, the prosecutor emphasized that defendant was "cloaked with the presumption of innocence." The prosecutor never commented on defendant's failure to produce evidence or explain incriminating evidence. The prosecutor did question the veracity of defendant's prior custodial and non-custodial statements, remarking that they were inconsistent with the evidence.¹⁶ Although

¹² The baby was given a tuberculosis test to ensure that she had not been exposed to TB after her father spent time in jail. The note stated, "Patient's father is in jail. Patient doing well."

¹³ *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995). See also US Const, Am V; Const 1963, art 1, § 15.

¹⁴ *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

¹⁵ *Fields*, *supra* at 115-116.

¹⁶ Defendant told all of the witnesses that the baby had fallen out of her crib. Defendant later told other witnesses that the baby's vaginal injuries were caused when he accidentally kicked her while playing football and when he scratched her with a jagged fingernail while changing her

(continued...)

defendant did not testify at trial, his credibility was at issue. He was the last person alone with the baby, but claimed that he had not harmed her.¹⁷ Where a defendant offers a defense that relies on his credibility, the defendant invites a prosecutor to cross-examine and argue the validity and weight of evidence in support of that position.¹⁸ The prosecutor did not argue that defendant had the burden to prove his innocence, but that defendant's statements to police and the baby's mother about the incident on October 22, 2002 were incredible. Accordingly, defendant's argument must fail.

II. Ineffective Assistance of Counsel

Defendant asserts that he was denied his constitutional right to the effective assistance of counsel. Absent a *Ginther*¹⁹ hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.²⁰ Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.²¹ To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.²² Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.²³ This court will not substitute its judgment for that of trial counsel regarding matters of strategy or assess trial counsel's competence with the benefit of hindsight.²⁴

Defendant challenges five incidents of alleged deficiency in representation. First, defendant contends that defense counsel improperly refused to permit defendant to testify at trial. If a defendant "decides not to testify or acquiesces in his attorney's decision that he not testify, 'the right will be deemed waived.'"²⁵ Defendant acknowledged his right to testify under oath, and stated on the record that he voluntarily chose not to testify after conferring with his attorney. We conclude that defendant waived his right to testify at trial when he elected not to assert the right. Defense counsel was not ineffective for failing to dissuade defendant from asserting this right.

(...continued)

diaper.

¹⁷ Defense counsel relied on defendant's statements that he had not harmed the infant in his arguments and cross-examination of the witnesses.

¹⁸ *Fields*, *supra* at 118.

¹⁹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

²⁰ *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

²¹ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

²² *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

²³ *Id.* at 600.

²⁴ *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

²⁵ *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985), quoting *Wisconsin v Albright*, 96 Wis 2d 122; 291 NW2d 487 (1980).

Defendant also claims that defense counsel was ineffective for failing to object to the admission of defendant's prior custodial and non-custodial statements to police officers and to request a *Walker*²⁶ hearing. However, where the accused voluntarily, knowingly and intelligently waives his Fifth Amendment rights, his statements made during custodial interrogation are admissible at trial.²⁷ The record indicates that defendant voluntarily gave statements to three separate officers, either after defendant waived his *Miranda*²⁸ rights or while defendant was not in custody. There is also record evidence that defendant's waiver was voluntary. As the record evidence indicates that defendant's statements were admissible, defense counsel was not ineffective for failing to raise a futile or meritless objection to their admission or request a *Walker* hearing.²⁹

Defendant argues that defense counsel was ineffective for failing to call any character witnesses to testify regarding defendant's reputation for truthfulness. Determining what evidence to present and whether to present or question witnesses are presumed to be issues of trial strategy, which we will not second-guess.³⁰ However, a defendant may overcome this presumption by showing that his counsel's failure to call witnesses denied him a substantial defense that affected the outcome of the proceedings.³¹ Defendant has failed to make this showing by presenting any evidence of the substance of the proposed testimony of specific witnesses to be offered. Therefore, his argument must fail.

Defendant asserts that defense counsel was ineffective for failing to have defendant psychologically evaluated to prove that he did not match the profile of a pedophile. However, defense counsel's decision not to pursue a psychological profile is presumptively sound trial strategy. Defense counsel focused the defense on evidence that other caregivers could have been responsible for the baby's injuries and defendant failed to show from the record that this choice prejudiced defendant's trial.

Defendant finally contends that defense counsel was ineffective for failing to research and present the neglect file of the baby's mother.³² Contrary to defendant's assertion, defense counsel did question the baby's mother during cross-examination about the neglect charges.

²⁶ *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

²⁷ *Abraham*, *supra* at 644.

²⁸ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

²⁹ *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

³⁰ *Rockey*, *supra* at 76-77.

³¹ *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

³² Following this incident, the Family Independence Agency placed the baby into care based on the mother's neglect in failing to protect her child.

Accordingly, we hold that, in all five instances of alleged deficient representation, defendant failed to overcome the presumption that he received the effective assistance of counsel.

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gibbs